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No. 94-1955

In The

Supreme Court of the United States

October Term, 1994

THE COUNTY OF BOYD, a local Nebraska political subdivision, and THE BOYD COUNTY LOCAL MONITORING COMMITTEE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

US ECOLOGY, INC.,

Respondent.

On Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN G. SEGLIN, #13756*
MARTI J. BROCKMEIER, #20040
CROSBY, GUENZEL, DAVIS, KESSNER & KUESTER
Attorneys at Law
Suite 400
134 South 13th Street
Lincoln, Nebraska 68508
Telephone: (402) 434-7300
Attorneys for Respondent
*Counsel of Record

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, US Ecology, Inc.[1], respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

[1] The parent corporation of US Ecology, Inc. is American Ecology, Inc. See, Supreme Court Rule 29.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 48 F.3d 359 (8th Cir. 1995). The opinion of the district court is reported at 858 F.Supp. 960 (D.Neb. 1994).

STATEMENT OF THE CASE

Petitioners' statement of the case inaccurately sets forth some of the facts underlying this action and omits others.

The district court found that it has diversity jurisdiction to decide this case. Pet. App. at 8. It therefore declined to decide whether the case could be entertained under federal question jurisdiction. *Id.* Conversely, the Eighth Circuit found that the case presents a federal question, and therefore declined to decide whether diversity jurisdiction exists. Pet. App. at 4. Contrary to the first question presented, the courts below correctly decided that the federal courts have jurisdiction to decide this case, either under the diversity of citizenship statute, or federal question statute.

As the district court's opinion discloses, there are no material facts in dispute in this case. Pet. App. at 21. The facts were determined by the district court to be uncontroverted. *Id.* Indeed, the petitioners conceded all of them to be true, *Id.*, including (a) that the Governor and the State of Nebraska, acted on behalf of Boyd County and the Boyd County Local Monitoring Committee in *Nelson I, as parens patriae;* (b) the claims raised in the action

are based on the same factual predicate and arise out of the same nucleus of operative facts as advanced in *Nelson I* and *Nelson II*; (c) essentially the same evidence as that offered in *Nelson I* and *Nelson II* governs the issue of fraud and negligence; and (d) Boyd County and the Boyd County Local Monitoring Committee are in privity with the plaintiffs in *Nelson I* and *Nelson II*. Pet. App. at 19-20.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No "Special And Important Reasons" Warranting Exercise of the Court's Certiorari Jurisdiction Exist.

As set forth in Supreme Court Rule 10.1, the Court grants petitions for certiorari "only when there are special and important reasons therefor." No such reasons are offered by the petition in this case.

Petitioners assert no split in the circuits on any question they present because there is none. Supreme Court Rule 10.1(a). Petitioners do not claim that the Court of Appeals has decided a federal question in a way that conflicts with an applicable decision of the Court. Supreme Court Rule 10.1(c). This case presents no important question of federal law which has not been, but should be settled by this Court. *Id.*

In reality, petitioners' claims boil down to complaints about the factual and legal determinations made by the lower courts. They seek to rehash issues which were fully presented to and decided by the lower courts. The Supreme Court ordinarily will deny certiorari when review is sought of a decision from a lower court which

turns solely upon an analysis of the particular facts. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925) (the Court stated: "[w]e do not grant a certiorari to review evidence and discuss specific facts."); *see also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (the Court ruled that it improvidently granted a cross-petition that presented primarily "a question of fact, which does not merit Court review."). The Supreme Court has also stated many times that it is not primarily concerned with the correction of errors in lower court decisions. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) "[t]his Court's review * * * is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." The grant of certiorari concept of importance has been held by the Court to focus on the significance of the matter to the public generally rather than the parties to the case particularly. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (the Court also provided that it does not sit "for the benefit of particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." (*id.* at 74)). Petitioners do not, nor could they in good faith, claim that the resolution of the issues they raise are of great consequence to the public at large; the issues here are important only to petitioners.

It is clear that petitioners seek a mere correction of perceived errors by the lower courts when they argue that their claims are factually and legally different from the claims presented in *Nelson I*. Pet. at 5-6. Nevertheless, petitioners attempt to bolster their petition by claiming

that the lower courts departed from "the accepted and usual course of judicial proceedings." Pet. at 7. This reference is apparently designed to invoke the Court's supervisory authority over the federal judicial system. *See* Supreme Court Rule 10.1(a).

Review of the Court's decisions shows that it exercises its supervisory authority only when truly important procedural or substantive issues are involved. For example, the administration of criminal justice in federal court (*McNabb v. United States*, 318 U.S. 332, 341 (1943)); the proper establishment of federal jury panels (*Theil v. Southern Pacific Co.*, 328 U.S. 217, 225 (1945)); the scope of the federal contempt powers (*Sacher v. United States*, 343 U.S. 1 (1952)); the construction of the federal rules of civil and criminal procedure (*Hickman v. Taylor*, 329 U.S. 495 (1947)); the use of abstention doctrines (*Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982)); and the power of a district court to deny removal from a state court because the district court's docket was too heavy (*Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976)) all justify exercise of the Court's supervisory authority. However, the supposed "irregularities" petitioners cite, i.e. district court's reliance on respondent's notice of removal (Pet. at 8); district court's recitation of the opposition of the Governor of Nebraska to construct the low-level radioactive waste facility (Pet. at 9); the district court's reliance on statements made by petitioners' counsel in a related case (Pet. at 10); and the district and Eighth Circuit courts' reliance on the litigational history of the waste facility (Pet. at 10), are in no realistic way irregular. But even if they were, they do not

rise to the level of important federal questions customarily considered by the Court when exercising its certiorari jurisdiction.

Petitioners argue that their fraud allegations are not the same cause of action as in *Nelson I* and *Nelson II*, and that they are not bound to those decisions because they were not parties to *Nelson I* and *Nelson II*. These are the same issues raised and decided by the district and Eighth Circuit courts. Pet. App. at 21-22; Pet. App. at 5. The district court found that the causes of action were identical for res judicata purposes.

> The issue brought by Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* was whether the Compact Commission and US Ecology had "failed to obtain 'community consent,' thereby violating a resolution passed and adopted by the Commission, and violating the Low-Level Radioactive Waste Disposal Act adopted by the State of Nebraska to implement the Compact." *Nelson I*, 834 F.Supp. at 1208. The "inextricably linked" first and second causes of action in this case, (Filing 1 Ex. A ¶33), are based upon US Ecology's alleged "efforts to site a low-level radioactive waste facility in a community without that community's consent." (*Id.* ¶50.

Pet. App. at 33-34.

The Eighth Circuit Court of Appeals upheld this ruling finding that "[t]he doctrine of claim preclusion provides that all theories of recovery stemming from one factual situation must be brought at once, or are forfeited; the law will not tolerate successive suits by a plaintiff stemming from the same scenario." Pet. App. at 5-6.

Similarly, the district court found that there was "privity" between the petitioners and the Governor of the State of Nebraska because they " 'are so closely related' to Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* and 'their interests so nearly identical' that it 'is fair to treat them as the same parties for the purposes of determining the preclusive effect' of *Nelson I* and *Nelson II* on the present action." Pet. App. at 36. The reasons given by the district court for this close relationship are as follows:

> (1) the plaintiffs in all three actions (the Governor of the State of Nebraska or political subdivisions thereof) are political entities of the state, sharing common political bonds;
>
> (2) no private parties appear as named plaintiffs in *Nelson I, Nelson II* or in this case;
>
> (3) the plaintiff in *Nelson I* and *Nelson II* specifically asserted the interests of one of the Plaintiffs in this case (Boyd County, Nebraska) in bringing *Nelson I* and *Nelson II*; and
>
> (4) lead counsel for Plaintiffs in this case appeared in an effort to oppose the granting of the motions for summary judgment in *Nelson I*, asserting that the decision in *Nelson I* would resolve the issue of "community consent" adversely to one of the Plaintiffs in this case (the Boyd County Local Monitoring Committee).

Pet. App. at 40-41.

The Eighth Circuit upheld the decision of the district court stating:

> Here, the district court, in its comprehensive, thorough opinion, held that the interests of the

> plaintiffs in the *Nelson* cases and the County herein were identical. *County of Boyd*, 858 F.Supp. at 971-73.
>
> No other conclusion is possible. In the *Nelson* cases, the County's residents were represented by the state and the governor of Nebraska; in the present action, they are represented by the County, which seeks identical relief. [The County as used by the Eighth Circuit includes both Boyd County and the Boyd County Local Monitoring Committee].

Pet. App. at 6.

The claim of irregularity by the district court for considering counsel's litigation strategy (Pet. at 9-10) is not only mischaracterized by petitioners but answered in great detail in the court's decision. Pet. App. 37-39. The district court concluded by stating: "[f]rom Ms. Knapp's involvement it is *apparent as a matter of fact*, that Governor Nelson, the State of Nebraska and Plaintiffs in this case were 'closely related' at the time of *Nelson I*." Pet. App. 39.

Petitioners claim that the recitation of the litigational history of attempts to stop the construction of the low-level radioactive waste facility shows prejudice on the part of the district and Eighth Circuit courts because petitioners were not parties to the prior litigation and the case at bar does not seek to stop the construction of the facility. Pet. at 6, 10-11. The lower court's summary of prior litigation dealing with the same basic subject matter (Pet. App. at 22; Pet. App. at 2) is in no way unusual. Courts commonly recite historical facts in related cases and compare issues which may provide some insight in

analyzing the claims presented to them for decision. Nothing in that approach deprived the petitioners of any legal rights; more to the point, nothing in that approach departs so far from common adjudicative methodology to warrant this Court's attention.

Petitioners also complain that the district court's reliance on US Ecology's notice of removal and an exhibit attached thereto was a departure from the common understanding of the rules of evidence and constituted a ruling on the law unsupported by any precedent. Pet. at 7-8. This claim, however, misstates the district court's rationale for relying on US Ecology notice of removal and attached exhibit. The district court fully addressed petitioners' argument and supported its decision with complete and appropriate references to the facts and the law. *See* Pet. App. at 14-15.

Petitioners renewed this complaint before the Eighth Circuit, which specifically rejected it, apparently relying on the district court's analysis. Pet. App. at 4, n.3. Ironically, given their present complaints about "irregularities," petitioners also attempt to bolster their jurisdictional argument by raising new issues on appeal which were never presented to the district court, and by relying on a document never offered in evidence. Pet. App. at 4. The Eighth Circuit declined to resolve petitioners' arguments about diversity jurisdiction however, finding that "this case is within our subject matter jurisdiction because it presents a federal question." *Id.* It offered clear and persuasive reasons for that conclusion. *Id.* In addition, the petition does not quarrel with those reasons,

nor does it directly challenge the Eighth Circuit's jurisdictional ruling.

CONCLUSION

No special and important reasons warranting exercise of this Court's certiorari jurisdiction exist. Petitioners present no such "special and important reasons," but merely seek a review by this Court of the factual and legal determinations of the lower courts because of their dissatisfaction with the adverse decisions. The district court and Eighth Circuit correctly decided the issues of res judicata and removal jurisdiction. The claimed departure from the accepted and usual course of judicial proceedings is without merit. The petition for a writ of certiorari should be denied.

Respectfully submitted,

US Ecology, Inc., Respondent,

By: Steven G. Seglin
Marti J. Brockmeier
Crosby, Guenzel, Davis,
Kessner & Kuester
134 S. 13th Street, Suite 400
Lincoln, Nebraska 68508
Telephone (402) 434-7300